No. 76-1767

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General,
JOHN H. SHENEFIELD,
Assistant Attorney General,
HOWARD E. SHAPIRO,
Assistant to the Solicitor General,
ROBERT B. NICHOLSON,
SUSAN J. ATKINSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The initial opinion, findings of fact and conclusions of the district court are reported at 389 F. Supp. 1193 (J.A. 9928).[1] The opinion of the district court following this Court's remand (422 U.S. 1031) for

[1] "J.A." refers to the Joint Appendix in the court of appeals, which is the appendix herein pursuant to the Court's order dated November 7, 1977. "Pet. Br." refers to Brief for Petitioner. "Pet. App." refers to the appendix to the petition. "FP." refers to the district court's findings of fact adopted from those proposed by the plaintiff and "FD." to the separately numbered findings adopted from those proposed by the defendant.

further consideration in light of *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, is reported at 404 F. Supp. 457 (J.A. 9985). The opinion of the court of appeals affirming the decision of the district court but modifying its decree in part (Pet. App. A–2) is reported at 555 F. 2d 978.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1977. The petition for a writ of certiorari was filed on June 10, 1977 and granted on October 3, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a comprehensive ban on competitive price bidding for engineering services collectively agreed to and enforced by the National Society of Professional Engineers, violates Section 1 of the Sherman Act.

2. Whether the judgment of the district court, enjoining the Society from taking actions or making statements that would have the effect of perpetuating its unlawful ban on competitive price bidding for engineering services, is consistent with the First Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment provides:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT

In this civil antitrust suit filed by the United States, the district court initially found that petitioner, the National Society of Professional Engineers ("NSPE"), violated Section 1 of the Sherman Act by combining and conspiring with its members and various state engineering societies to eliminate any form of competitive price bidding in the sale of engineering services by means of Section 11(c) of NSPE's Code of Ethics (389 F. Supp. 1193; J.A. 9928–9973). Section 11(c), on its face and as practically applied and enforced, comprehensively bans any form of price competition that permits a prospective client to compare prices for engineering services prior to selection of an engineer.[2] It provides FP. 26; J.A. 9951):

[2] The complaint, filed in December 1972, alleged that the members of NSPE agree to abide by this provision and that NSPE and its members enforce the bidding ban (J.A. 13). The complaint asked for declaratory and injunctive relief against the continued promulgation and enforcement of the bidding ban (J.A. 14–15).

In its answer, NSPE admitted adopting and publishing Section 11(c), but denied all liability (J.A. 16–24).

The parties engaged in extensive discovery prior to trial. During the five-day trial, NSPE called five witnesses (J.A. 1597, 1682,

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> Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding. . . .
>
> * * * * *
>
> He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed

1741, 1958, 2318) and the government called three (J.A. 2049, 2149, 2210). The witnesses testified about the nature of professional engineering and the nature, operation and enforcement of NSPE's ban on competitive bidding. In addition to the testimony at trial, NSPE introduced depositions of twelve individuals (J.A. 27–1528), and both the government and NSPE submitted voluminous documentary evidence.

> work. These principles shall be applied by the Engineer in obtaining the services of other professionals.

While NSPE's direct appeal to this Court was pending, *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, was decided. The Court then vacated the district court's judgment in this case and remanded for further consideration in light of *Goldfarb* (J.A. 9984). 422 U.S. 1031. Upon reconsideration, the district court held that *Goldfarb* supported its analysis and reaffirmed its prior decision (404 F. Supp. 457; J.A. 9985–9990). The court of appeals affirmed the district court's findings of fact and conclusions of law and modified the judgment in one respect (555 F. 2d 978; Pet. App. A–2—A–13) (see pp. 29–31, *infra*). The facts are set forth in the district court's initial findings, 69 of which were adopted with modifications from those proposed by the government (FP. 1–69, J.A. 9944–9964), and 56 from those proposed by NSPE (FD. 1–56, J.A. 9964–9972).

I. NSPE'S BAN ON PRICE COMPETITION

A. NSPE AND THE NATURE OF ENGINEERING SERVICES

NSPE is an organization formed to promote the economic, professional and social interests of engineers (FP. 3, J.A. 9944). It is incorporated and has affiliated state societies and local chapters in every state and territory; a person who joins NSPE simultaneously joins the appropriate state society and local chapter (FD. 11, 12, J.A. 9965).[3] NSPE has approxi-

[3] The converse is also true: an engineer who joins a state society automatically becomes a member of NSPE (FD. 12, J.A. 9965).

mately 69,000 members, 55,000 of whom are registered under the laws of the several states (FP. 2, J.A. 9944).

Approximately 12,000 NSPE members are consulting engineers who provide services for a fee (FP. 4, 19, J.A. 9945, 9949).[4] Consulting engineers are employed by or operate engineering firms that vary in size from one-man firms to publicly held corporations which actively market and promote their services nationwide (FP. 9, 18, 19, 20, J.A. 9946, 9948–9949).[5] Some engineering firms are affiliated with or owned by architectural firms or by other corporations engaged in allied or related fields, such as construction, management and real estate development, and these relationships may result in a very large group of firms controlled by a holding company (FP. 23, J.A. 9950). The majority of consulting engineers are in

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The Board of Directors of the national society is comprised of representatives of the 54 affiliated state societies, who have voting power in proportion to the size of the membership of the state society (J.A. 1753–1754, 2494–2495).

[4] There are approximately 325,000 registered professional engineers in America; roughly half are consulting engineers (FP. 7, J.A. 9945–9946; FD. 10, J.A. 9965).

[5] Although 60 percent of engineering firms employ fewer than five engineers (FD. 6, J.A. 9965), larger firms account for a substantial part of total engineering revenues. For example, in 1972 the 438 largest architectural-engineering design firms accounted for approximately $2.2 billion in fees (FP. 17, J.A. 9948). See also FP. 21, J.A. 9949.

In addition, there are several large "design/construct" firms, which construct projects in addition to doing consulting engineering; the 62 largest design/construct firms in 1972 received contracts totalling $26 billion (FP. 24, J.A. 9950).

practice in five broad areas of engineering (civil, mechanical, electrical, chemical, and mining) and may confine their practice to more specialized areas within these categories (FP. 7, J.A. 9945–9946; FD. 4, 9964–9965).

Engineering services are necessary to the study, design, and construction of all types of structures. "These services include pre-feasibility studies, feasibility studies, planning, preliminary studies, the preparation of drawings, plans, designs, specifications, cost estimates, manuals and reports, consultations, surveys, and inspection. Engineering firms also provide various related services such as soil boring and surveying, reproduction of drawings and specifications, economic and financial surveys and data processing, both for other engineers and governmental or commercial clients" (FP. 11, J.A. 9946–9947). "On occasion, engineering firms sell non-engineering related services such as computer services" (FP. 23, J.A. 9950).

The dollar value of those services is substantial (FP. 19, J.A. 9949). Engineers, usually in conjunction with architects, work on projects worth many billions of dollars. Engineering fees alone amount to 5 to 6 percent of total construction costs, and architect-engineer fees annually total around $4.7 billion (FP. 16, 17, J.A. 9948).

"Many engineering firms actively market and promote the sale of their services to prospective clients" (FP. 20, J.A. 9949). Some firms employ marketing specialists and business development personnel who

seek contacts with individuals, firms and government agencies that might be potential sources of business. Firms distribute promotional brochures to prospective clients describing their operations, past work, capabilities and personnel (FP. 20, J.A. 9949).[6]

B. THE ORIGIN OF THE BAN ON COMPETITIVE BIDDING

NSPE's ban against competitive bidding has a lengthy history; it developed from the organization's Rules of Professional Conduct and Canons of Ethics.[7] These rules and canons express two principal ideas: that it is generally possible for an engineer before being hired to inform clients of the cost of his proposed services; and that it is undesirable for him to do so.

For example, former Rule 50, adopted in 1957, expressly provided that before being hired the engineer "should set forth in detail the work he proposes to accomplish" when asked for such a proposal (J.A.

[6] Examples of these promotional brochures are reproduced at J.A. 8448–8949, 9097–9889.

[7] NSPE formulated and adopted the Rules of Professional Conduct. The Canons of Ethics were formulated by the Engineers Council for Professional Development, a federation of engineering societies concerned with development of rules of ethics, and NSPE adhered to them (J.A. 6241, 7174, 7184, 1833–1834, 1837–1838, 1842).

7182).[8] It warned the engineer to avoid, "if possible," a "statement of monetary remuneration expected" for the job. The rule advised him that if "such a statement be deemed necessary," he should submit a bid "equal to or more than the fees recommended as minimum for the particular type of service required, as established by fee schedules * * *." If no area-wide fee schedule was available, NSPE told its members that it was ethical to price the job "equal to actual cost plus overhead plus a reasonable profit" (J.A. 7182).[9]

In 1961, NSPE amended the Rules to narrow the circumstances in which an engineer ethically could inform a prospective client of his charges. Rule 50, which had previously allowed price quotations where "such a statement be deemed necessary" (J.A. 7182), was changed to permit such information only "[s]hould the owner insist" (J.A. 6380, 6382). Similarly, Rule 50 provided that any price quotation must be limited to "the recognized professional society

[8] Rule 50 also provided that it is ethical for engineers to solicit clients "in the form of a letter or a brochure" advertising the firm's qualifications and past accomplishments (J.A. 7182).

[9] Section 26 of the Canons provided: "[The Engineer] will not compete with another engineer on the basis of charges for work by underbidding, through reducing his normal fees after having been informed of the charges named by the other" (J.A. 7182).

fee schedule for the particular type of service required in the * * * area * * *'" (J.A. 6380, 6382).[10]

In September 1963, the Engineers Council revised its Canons of Ethics and adopted a provision which permitted competitive bidding for professional services when competition is not based on price alone (J.A. 6243).[11] That Canon provided that an engineer

> will not invite or submit price proposals for professional services, which require creative intellectual effort, on a basis that constitutes competition on price alone. Due regard should be given to all professional aspects of the engagement [J.A. 6239, 6243].

NSPE adopted its present Code of Ethics in 1964. During the deliberations, the NSPE Ethical Practices Committee[12] recommended against the adoption of the Engineers Council Canon as not being a sufficiently comprehensive prohibition upon price competition for

[10] Rule 49 was also amended to provide that an "engineer who is requested to submit a competitive bid to an owner or a governmental body should remove himself from consideration for the proposed work" (J.A. 6382; compare J.A. 7182).

After NSPE amended Rules 49 and 50, the Society's Board of Ethical Review ("BER") issued an opinion based on them. BER Case 60–2 (J.A. 2564; compare J.A. 6380).

The provision in Rule 50 stating that solicitation on other than a fee basis is ethical remained unchanged.

[11] This provision, Canon 3.7, was adopted by the American Institute of Mining, Metallurgical, and Petroleum Engineers, and the American Society of Heating, Refrigeration and Air Conditioning Engineers (J.A. 6243).

[12] The Ethical Practices Committee is the official NSPE body which studies and reviews NSPE's ethical standards and recommends revisions of the NSPE Code of Ethics and professional policies to the Board of Directors (J.A. 2508, 1766–1768).

engineering services (J.A. 6242–6245). As a result of this recommendation and the overwhelming support of NSPE members who commented on the proposal, the NSPE Board of Directors adopted Section 11(c) in July 1964 (J.A. 6242–6245, 6263, 6487).

C. THE SCOPE AND OPERATION OF THE BAN ON COMPETITIVE BIDDING

The district court found that for most of the period charged in the complaint (July 1966 to July 1972), the ban applied " 'to all services provided by a professional engineering firm' " (FP. 28, J.A. 9952). In 1966, the NSPE Board of Directors adopted Professional Policy 10–F,[13] which so provided (J.A. 5766,

[13] NSPE Professional Policies are adopted by its Board of Directors, usually upon recommendation of the Ethical Practices Committee, and constitute guidelines to supplement and define the Code of Ethics for the conduct of its members and their firms (J.A. 785–786, 2508, 1766–1768).

Professional Policy 10–F supplemented a 1962 Board of Ethical Review opinion that Rules 48 to 51 and Canon 26 do not apply to research and development contracts ("R & D") (J.A. 2599–2600). The Board of Ethical Review reconsidered the R & D question in 1971. At first, an opinion was drafted to permit engineers to submit price proposals for R & D and study contracts (J.A. 5727–5732). One BER member opposed this on the ground that such a retreat from NSPE's total opposition to price competition for engineering services was inadvisable because "we must not give an inch, * * * if we do the bid boys will take another inch, then another * * * to cave in to allow firms to bid for anything will ruin our chances for corrective legislation, prejudice our situation with the Government Procurement Commission * * *" (J.A. 5733). BER approved a revised opinion that made it unethical for an engineer to submit a price proposal for nondesign study contracts (J.A. 5734–5736).

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7275). The district court found that NSPE's purpose in adopting that all-encompassing policy was to " 'make it clear beyond all doubt that NSPE opposes competitive bidding by engineers in private practice for any service performed by an engineer or firm in private practice' and to avoid suggesting 'loopholes' to the membership" (FP. 28, J.A. 9952, 5766). NSPE interpreted Policy 10–F as prohibiting bidding for blue-printing services and for the lease of spare computer time, as well as for surveying, drafting and soil testing services (J.A. 6282–6284, 6442, 6579, 6586, 5862). NPSE's General Counsel advised its members that

> if a firm wishes to engage in a service which requires competitive bids it should do so through an organization with a different name and identification not implying that it is a consulting engineering firm. This would apply, for example, if a firm wished to do a research and development job for the Government, which requires price submissions prior to selection of the contractor [J.A. 6445].

In July 1972, NSPE revised its interpretation of the scope of the bidding ban to exclude work involving "special studies" or research and development ("R & D").[14] In the late 1960s and early 1970s demand by state and federal governments for special studies of a research and development nature increased rapidly. This increase appeared likely to

[14] The revised interpretation of Section 11(c) is set forth in Professional Policy 10–G (J.A. 2445).

continue. Such R & D work was financially attractive, not just to engineering firms but also to non-architectural-engineering ("non-A-E") firms, such as research institutions, management consultants, and industrial firms that wanted such business and were accustomed to bidding for their work (J.A. 5738).

NSPE found itself in a dilemma. On the one hand, NSPE and other A-E societies recognized that they would either have to revise their comprehensive ban on competitive bidding to meet competition from non-A-E firms or "abdicate" the whole R & D field to those firms (J.A. 5737, 5741; see also 6530–6531, 6263, 2075–2079). They also realized that "[i]f A-E's abdicate the 'Special Studies' field, the non-A-E's handling that field will soon extensively invade the 'Conventional Services' field" (J.A. 5741). On the other hand, NSPE believed that "[o]f all classes of work, * * * R&D is the least appropriate for bidding. By the very nature of it, it doesn't have a real definite outline, a well-defined beginning and end * * *" (J.A. 6531; see also. J.A. 5739, 1874–1875, 2019, 2068–2070, 2075, 2081–2082, 2178–2179).

The principal NSPE study of whether Section 11 (c) should prohibit price proposals for R & D work contrasted the routine, repetitive nature of engineering services with the unique, difficult nature of R & D projects (J.A. 5739).[15] Nevertheless, NSPE in the

[15] The study showed that, "[i]n the case of special studies, the scope, level of effort, required approach, and necessary steps are unique to each project and do not follow a general pattern." The

face of the threat of competition from non-A-E firms, resolved its dilemma by revising its ban on competitive bidding to exclude the R & D area (J.A. 2445, 5737, 5748–5749).

D. THE SWEEPING CHARACTER OF THE BAN ON COMPETITIVE BIDDING

Under the revision of July 1972, Section 11(c) covers all "professional services associated with the study, design and construction of real property improvements * * *" (FD. 56, J.A. 9972). These services are defined broadly to include "pre-feasibility and feasibility studies, comprehensive and general planning, preliminary studies, preparation of drawings, plans, designs, specifications, cost estimates, other studies and preparation of manuals and reports, consultations, performance of surveys, inspection and development related to the preceding categories" (FD. 56, J.A. 9972).

Section 11(c) applies no matter how simple the project, how expert the purchaser, or how thoroughly the engineer has been able to study the project before quoting a price. The ban applies even though NSPE has ruled that after selection, engineers may charge less than state society schedule of minimum fees for

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study recognized that in contrast, "[c]onventional services usually apply to customary types of assignments" and "[n]ormally there have been significant numbers of other similar projects so that the required scope of effort, approach, and necessary steps are generally known" (J.A. 5739). NSPE distributed this study to several national A–E societies, to all members of NSPE's Board of Ethical Review and to numerous NSPE officials in connection with their consideration of the R & D bid problem (J.A. 5746, 5747–5748, 6432, 6439, 6441, 1353).

work that is so repetitive that it "permits him [the engineer] to use the same design as had been used in a previous project" (FP. 41, J.A. 9955).

Typically there have been substantial numbers of similar projects in which the "scope of effort, approach and necessary steps" are known to the engineer (J.A. 5739, 1722, 1881–1882.) [16]

Although NSPE recognizes that engineering customers include persons with technical sophistication (J.A. 5739), the district court found that Section 11(c) bars even clients who are engineers from soliciting price information (FP. 30, J.A. 9953).[17]

Under Section 11(c) no fee information that can be compared to that of another engineer may be given to any prospective client. This includes any "cost estimates or other proposals in terms of dollars, man days of work required, or percentage of construction cost" (J.A. 9939). The sole exception is

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[16] In a study prepared for the Committee on Federal Procurement of Architect-Engineer Services (COFPAES) to consider the effect on engineers of increasing competition from non-engineers for special studies or research and development projects, it was recognized that for more traditional services "[n]ormally there have been significant numbers of other similar projects so that the required scope of effort, approach, and necessary steps are generally known. Because of this, published fee guides have been prepared in forms such as ASCE [American Society of Civil Engineers] Manual 45. Conventional services are usually not a problem from the standpoint of competitive bidding, because it is possible for the client to refer to the fee guides for an idea of the level of effort or range of cost for the A–E [architect-engineer] services. [J.A. 5739]."

[17] Section 11(c) expressly prohibits engineers from requesting, as well as providing, price information (FP. 30, J.A. 9953).

the provision in Section 11(c) that provides that members may disclose "recommended fee schedules prepared by various engineering societies * * *" (Section 11(c), FP. 26, J.A. 9951).

Deviations from the fees set forth in state or local fee schedules violate Section 9(b) of the Code (FP. 31, 32, 39, 40, J.A. 9953, 9955). Section 9(b) provides:

> Section 9—The Engineer will uphold the principle of appropriate and adequate compensation for those engaged in engineering work . . . .
>
> b. He will not undertake work at a fee or salary below the accepted standards of the profession in the area [FP. 39, J.A. 9955].[18]

Sections 11(c) and 9(b) together allow the prospective client only such price information as he can

[18] In addition to Section 9(b) of the Code, NSPE has promoted the use of fee schedules in its Guide for Professional Engineer's Services. The Guide provides: "The recommended fees for mechanical and electrical engineering services rendered for Architects and other Engineers should be as follows: When an Engineer furnishes service to another Engineer or an Architect the fee for such services should reflect the acceptable fee for the area in which the service is rendered. Where State minimum fee schedules are available, these should be used [J.A. 5490]." The Guide states that even fees for reproducing documents are to be based on the state society's fee schedule. Where the cost of reproducing documents is borne by the mechanical or electrical engineer, "his fee should not be less than 85% of the fee received by the Prime Design Professional * * *" (J.A. 5490). This percentage is in turn "based on the assumption that the principal Design Professional's fee complies with the minimum recommended fee schedule of his particular professional group" (J.A. 5490). The NSPE Guide contains a list of state fee schedules and addresses where copies can be obtained (J.A. 5493). Contrast Pet. Br. 40, n. 182.

glean from the "uniformly regular fee schedule" prepared by the state society (J.A. 9940).[19]

Should a client persist in requesting a price other than the state or local society's fee schedule prior to the start of negotiations, Section 11(c) requires that the engineer "withdraw from consideration for the proposed work" (FP. 26, 30, J.A. 9951, 9952–9953). Thus, the prospective purchaser of engineering services must select one engineering firm with whom to negotiate, solely on the basis of background and reputation and, except for the state or local society's recommended fee schedule, in ignorance of the cost of those services (J.A. 9930; FD. 45, J.A. 9970).

E. NSPE'S ENFORCEMENT OF THE BAN ON COMPETITIVE BIDDING

1. The district court found that the provisions of the Code of Ethics are "binding rules enforced by NSPE and its state societies" (FP. 52, J.A. 9959). Apparent violations of the Code are usually referred to the state society that has primary responsibility for disciplining members for ethical violations (FP. 52, J.A. 9959–9960; FD. 34, J.A. 9968). Provisions in the constitutions of NSPE and its state societies provide for censure, suspension, and expulsion for violations of the Code, and any such action by a state society auto-

[19] The district court stated that the legality of the fee schedules was not an issue in this case, but that "insofar as the use of fee schedules by defendant's members might affect the impact which Sec. 11(c) has on trade and commerce, an inquiry into their promotion and enforcement by defendant is plainly relevant" (J.A. 9940 n. 3).

matically applies at the national and local levels of the NSPE organization as well (FP. 52, J.A. 9959–9960).

A determination that an engineer has violated the Code not only can result in NSPE or state society sanctions, but generally is damaging to the engineer's professional standing (FP. 52, 55, J.A. 9959, 9960). Engineers are concerned about their reputations among their colleagues and generally seek to conduct their work in accordance with the Code (FD. 37, J.A. 9969).

NSPE also recommends procedures to be followed by state societies when charges of unethical conduct are filed against an NSPE member at the state society level (FP. 53, J.A. 9960). These include procedures for interstate cooperation by state societies in instances where alleged misconduct occurs in one state by members of another state society (FP. 53, J.A. 9960). Although NSPE does not have the power to compel an affiliated state society to take any action—although it may withdraw the state society's charter of affiliation—the national society's suggested procedures represent the typical disciplinary practices of the state societies (FP. 53, J.A. 9960; FD. 13, 15, J.A. 9966).

2. NSPE has promoted and coordinated the enforcement of Section 11(c) of its Code of Ethics by its state societies (FP. 56, J.A. 9960). An example related to the construction of the Tri-State Airport in West Virginia. Tri-State Airport Authority in Huntington,

West Virginia, solicited proposals from engineering firms for an airport runway extension project (FP. 56, J.A. 9960–9961). The Authority initially chose one firm by the traditional selection process, but it viewed the $500,000 fee quoted by the firm as excessive. It then requested price proposals from five firms selected as best qualified. Three of them submitted fee proposals (FP. 56, J.A. 9960–9961).

Several of the engineering firms that had been involved initially brought the request for price proposals to the attention of the West Virginia Society of Professional Engineers, which in turn relayed the complaints to the chairman of the Professional Engineers in Private Practice division ("PEPP") of NSPE (FP. 57, J.A. 9961).[20] The PEPP chairman sent telegrams to each of the five engineering firms, reminding them that there were "[v]alid reasons in addition to Code of Ethics, for refusing to enter into competitive bidding" and "[s]trongly" urging them to withdraw (FP. 58, J.A. 9961).[21] He also wired the president of the Tri-State Airport Authority, asking that he withdraw the request for fee proposals (FP. 58, J.A. 9961).

As a result of the telegram, one of the engineering firms withdrew its fee estimate and notified NSPE of its action (FP. 59, J.A. 9962). The Authority subse-

[20] PEPP is a division of NSPE which is devoted to serving the interests of consulting engineers (J.A. 6948).

[21] The telegram also pointed out that participation weakens the position of NSPE/PEPP in an effort to halt use of competitive bidding procedures by federal agencies (FP. 58, J.A. 9961).

quently awarded the contract to a firm which had quoted a $300,000 maximum fee, thus reducing its engineering cost by $200,000 (FP. 61, J.A. 9962).

On January 12, 1972, the PEPP Board of Governors directed the PEPP Executive Board to investigate the Tri-State Airport incident " 'and take appropriate action thereon on behalf of NSPE/PEPP' " (FP. 62, J.A. 9962). PEPP's chairman called a special meeting of national directors and presidents of member societies in the four states in which the firms suspected of having submitted price proposals were located (FP. 62, J.A. 9962). At this meeting, the chairman indicated that NSPE expected the state societies to enforce the NSPE Code (FP. 63, J.A. 9962).

It was decided that PEPP would coordinate an investigation of the incident by holding a hearing with five firms and their state societies (FP. 63, J.A. 9962). NSPE officials believed the investigations would " 'demonstrate to all observers that we can and will keep our own house in order' and that if no action were taken at this time 'the situation will crop up again and again' " (FP. 63, J.A. 9963). The NSPE membership was to be advised of this investigation " 'so that all of the members of the Society * * * recognize that we intend to enforce our code of ethics when cases are brought to our attention' " (FP. 64, J.A. 9963).

At the hearing, the firms were questioned about their participation in the Authority's selection procedure and at the conclusion the state societies were

advised that any action against the individual firms was their responsibility (FP. 66, J.A. 9963–9964). At least three NSPE state societies conducted further investigations (FP. 66, J.A. 9964).[22]

3. NSPE organized its members in a successful attempt to frustrate an experimental and limited competitive bidding program by one of the most sophisticated purchasers of engineering services, the United States Department of Defense. The court of appeals summarized the district court's findings concerning these efforts as follows:

> * * * [P]requalified engineering firms were invited to submit two sealed envelopes separately containing a technical proposal and a non-binding price estimate. The technical proposals were to be opened and evaluated by a

[22] The district court recognized that this was but one example of NSPE's enforcement activity (FP. 56, J.A. 9960). Other instances of NSPE enforcement activity in conjunction with its state societies included its activities to prevent competitive bidding for the following engineering projects: a bridge project for the Mississippi River Bridge Authority (J.A. 6104–6111); a sewage treatment facility in Fall River, Massachusetts (J.A. 6156–6160); a feasibility study for sewage, water and storm drainage facilities in Calhoun County, Michigan (J.A. 6173–6180); an electrical engineering study for the Lyons, New Jersey, Veterans Administration Hospital (J.A. 6222–6228); water and sewer projects for Northampton and Halifax Counties in North Carolina (J.A. 6161–6168); engineering services for modernization of the water treatment facility in Ellwood City, Pennsylvania (J.A. 6150–6153, 1884–1885, 1890–1892); an engineering project for the New York Metropolitan Transit Authority (J.A. 6112–6125, 6127–6135, 6138); and a mine water drainage project for Harrison County Water Improvement Group (J.A. 6201–6202, 6204–6221, 1886–1887, 1890–1891).

selection board on the basis of their technical competence. Then the envelopes containing the price estimates were to be opened and a determination made as to whether price considerations warranted a change in the ratings of the proposals. The test procedure was to be conducted for a period of only one year, and in only two military construction districts. Despite the relative sophistication of the purchaser, the extensive provision for consideration of factors other than price, and the limited nature of this experiment, the Society advised its members that the DOD test procedure was unethical and urged them not to submit price information. As a result, the Department of Defense was unable to obtain price proposals under the test procedure [Pet. App. A–9 – A–10; see also FP. 46–51, J.A. 9957–9959].

F. THE ECONOMIC PURPOSE OF THE BAN

The economic purpose of the ban was revealed in NSPE's promotional program to restrict price competition. In 1966, NSPE instituted a program to educate all professional engineers about the evils of competitive bidding (FP. 33, 34, J.A. 9953). As part of this effort, members of NSPE's PEPP section gave speeches telling NSPE members that "price competition could only result in the lowering of engineering fees" (FP. 35, J.A. 9953).

NSPE also prepared and distributed pamphlets on competitive bidding to its members and to purchasers of engineering services (FP. 34, 36, 37, J.A. 9953–9955). NSPE's General Counsel and Director of

Professional Services advised that in preparing the pamphlet directed to engineers in private practice, NSPE "should try to have it emphasize the pocketbook interests of the consultant by pointing out that in the long run he reduces his own fee capability by bidding * * *" (J.A. 6300). The General Counsel was of the view that NSPE would have "more impact through the 'selfish' approach" (J.A. 6300). The pamphlet distributed to engineers in private practice warned them that "[s]ome firms have already been forced out of business due to financial failure caused by competitive bidding" (J.A. 6304; FP. 36, J.A. 9954).

The purpose of the ban also was shown by the promulgation and repeal of an amendment to Section 11(c) known as the "When-in-Rome" clause (J.A. 6487). In July 1966, NSPE amended Section 11(c) to permit members to submit competitive price proposals for engineering work in foreign countries where such proposals were required in order to be considered for the work. This amendment [23] was adopted at the request of NSPE's Professional Engineers in Private Practice ("PEPP") section in order to "reflect a

[23] The clause reads: "When engaged in work in foreign countries in which the practice is to require the submission of tenders or bids for engineering services, the Engineer shall make every reasonable effort to seek a change in the procedure in accordance with this section, but if this is not successful the Engineer may submit tenders or bids as required by the laws, regulations or practices of the foreign country [J.A. 6487]."

The American Society of Civil Engineers ("ASCE") had a similar exception in its Code of Ethics (J.A. 401–402).

realistic problem" and permit United States engineering firms to obtain jobs in foreign countries without violating Section 11(c) of the Code of Ethics (J.A. 6340, 6579, 1809–1811, 401–402).

NSPE, however, found that the clause was an embarrassment in its effort to stop competitive bidding in the United States. As the PEPP Section Committee observed (J.A. 9890):

> This is a poor time to have such a policy with GAO pressures for competitive bidding of U.S. Government work. How can we explain satisfactorily to GAO why OK to bid on overseas work but not on domestic work? [24]

Accordingly, NSPE abolished the "When-in-Rome" clause in 1968 (J.A. 6344).

II. THE COMPETITIVE IMPACT OF THE RULE

The district court and the court of appeals found that the language, purpose and effect of Section 11(c) was to maintain prices.

The district court found that the rule prohibits members from "engaging in any form of price competition when offering their services" (J.A. 9939). As a result, "the only price information available for input into the client's selection equation is a

[24] The PEPP section agreed with its Committee, recommending that the clause be deleted in order to prevent NSPE's opposition to competitive bidding from being "chipped away, piece by piece" (J.A. 6351).

uniformly regular fee schedule" (J.A. 9940). "[T]he agreement among [petitioner's] members to refrain from competitive bidding is an agreement to restrict the free play of market forces from determining price * * *. The ban narrows competition to factors based on reputation, ability and a fixed range of uniform prices. The prospective client is thus forced to make his selection without all relevant market information" (J.A. 9941).

The court of appeals observed that the ban applies without regard to "the sophistication of the purchaser, the complexity of the project, or [the sophistication of the] procedures for evaluating price information" (Pet. App. A–9). It impairs economic decisionmaking because, as the district court found, "[w]ithout the ability to utilize and compare prices in selecting engineering services, the consumer is prevented from making an informed, intelligent choice" (J.A. 9988). In consequence, the court of appeals stated, the case involves "a rule that is sought to be justified in terms of avoiding dangers to society, but which has been both written and applied in practice as an absolute ban (affecting prices) that governs situations where there are no such dangers. In that context, the absolute rule is fairly identified as a price-sustaining mechanism" (Pet. App. A–12).

III. THE PROCEEDINGS BELOW

A. THE FIRST DECISION OF THE DISTRICT COURT

The district court, after evaluating the testimony and the extensive documentary evidence, found that

NSPE's agreement "is in every respect a classic example of price-fixing" and constitutes a *per se* violation of Section 1 of the Sherman Act (J.A. 9941). The court also found that "NSPE and its members actively pursue a course of policing adherence to the competitive bid ban * * *" (J.A. 9940).[25] The court held that the sale of engineering services is trade or commerce subject to the Sherman Act (J.A. 9934–9938). It ruled that NSPE's price-fixing is merely a private agreement "formulated outside the command and supervision of a state agency" which is not exempt "state action" (J.A. 9943).

The court's judgment enjoined NSPE from participating again in a similar restraint of trade (¶ VI, J.A. 9975); ordered it to strike from its official documents any provisions discouraging the submission of price quotations for engineering services and any fee schedules (¶¶ V and VI, J.A. 9975–9976) barred it from adopting or disseminating any official statement stating or implying that competition based on fees is unethical (¶ VII, J.A. 9976) directed the publication of the judgment in various NSPE publications, as well as a statement that NSPE does not consider the submission of price quotations at any time unethical (¶ VIII, J.A. 9976–9977); and directed NSPE to revoke the charter of any state engineering society which discouraged price competition in engineering (¶ IX, J.A. 9977–9978).

NSPE appealed to this Court. While the appeal was pending, the Court on June 16, 1975, decided

[25] These findings are summarized at pp. 17–25, *supra*.

Goldfarb v. *Virginia State Bar*, 421 U.S. 773. One week later the Court vacated the judgment in this case and remanded for further consideration in light of *Goldfarb. National Society of Professional Engineers* v. *United States*, 422 U.S. 1031 (J.A. 9984).[26]

B. THE SECOND DECISION OF THE DISTRICT COURT

After reconsideration,[27] the district court issued a second opinion (404 F. Supp. 457, J.A. 9985). It observed that "[i]n determining that the fee schedule in *Goldfarb* constituted a price fixing practice," this Court had emphasized "the nature of the restraint, the enforcement mechanism, and the fee schedule's adverse impact upon consumers" (J.A. 9987). Guided by this Court's analysis in *Goldfarb*, the district court reiterated its findings with respect to these three aspects of NSPE's ban on competitive bidding and held that "the combined character, enforcement, and effect of NSPE's bidding ban constitute a classic illustration of price fixing under *Goldfarb*" (J.A. 9988).

The court further held that NSPE's bidding ban is "not an advisory measure," but rather is "an absolute prohibition on price competition among defendant's members," which they actively promote and enforce and to which they uniformly adhere (J.A.

[26] The Court had previously denied NSPE's motion for expedited consideration together with the *Goldfarb* case. 420 U.S. 905.

[27] On remand the parties agreed that a further evidentiary hearing was unnecessary, and they submitted briefs and presented oral argument concerning the implications of the *Goldfarb* decision.

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9987–9988). The court also emphasized that "[t]he ban clearly impedes the ordinary give and take of the market place" and " 'tamper[s] with the price structure of engineering fees' " (J.A. 9987).

The court rejected NSPE's contention that price restraints in the engineering profession should be assessed under the rule of reason rather than by the *per se* rule applied to other businesses and professions. It held (404 F. Supp. at 461; J.A. 9989–9900; footnote omitted):

> First, such a construction would substantially undermine the *Goldfarb* Court's denial of a total or partial exemption from antitrust regulation for professions. Neither the nature of an occupation nor any alleged public service aspect provides sanctuary from the Sherman Act. *Goldfarb, supra,* 421 U.S. at 787, [95 S. Ct. 2004]. Second, *Goldfarb* does not rest upon a rule of reason analysis. The Court found price fixing activities and condemned them outright. Third, Footnote 17[28] apparently distinguishes between a profession's business aspects and its valid self-regulatory "restraints," such as membership requirements or standards of conduct.

[28] Footnote 17 of the *Goldfarb* opinion states (421 U.S. at 788–789): "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today."

> Price fixing, however, receives no privileged treatment when incorporated into a code of ethics. Fourth, the activities at issue here have a wide-ranging commercial impact and therefore are to be judged by normal antitrust standards applicable to business practices. Fifth, while NSPE claims that its ban on competitive bidding protects public safety and health, the Supreme Court in *Goldfarb* had before it and rejected similar arguments aimed at preventing "cheap but faulty work" by professionals. The age-old cry of ruinous competition, competitive evils, and even public benefit cannot justify price fixing.

Again the district court entered judgment for the government.[29]

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals unanimously affirmed (Pet. App. A–2-A–13). The court held that the district court's findings of fact were not clearly erroneous, and agreed with most of its legal reasoning (*id.* at A-5). It ruled that "in both legal and practical consequence," petitioner's prohibition of free price competition is "not far removed" from price fixing (*id.* at A–7), and that its "prohibition of competitive

[29] At the oral argument on November 7, 1975, counsel for NSPE fleetingly referred to a desire for a hearing "on the form and content of the decree" (Tr. 51). Although the United States did not object to such a hearing and the district court expressed no unwillingness to hold one, counsel for NSPE did not pursue the matter further, either in the ensuing three weeks leading to entry of judgment or thereafter.

bidding, by blocking the free flow of price information, strikes at the functioning of the free market" (*ibid.*). Such a ban, the court concluded, is "at least presumptively condemned in a way that does not apply to other trade practice rules" (*ibid.*).

The court pointed out that the district court had not simply evaluated Rule 11(c) on its face, but had taken "into account how it had operated in fact, and with what practical anticompetitive consequences" (*id.* at A–7-A–8). Because of the nature of the restraint, which has a "universal sweep" (*id.* at A–7), the court of appeals concluded that the district court was not required to balance the claimed benefits against the competitive burdens of the rule (*id.* at A–8).

The court also held that the district court had correctly carried out its responsibility, under this Court's remand, to reconsider the case, and "that although *Goldfarb* was not a square holding absolutely in point * * * its major thrust was in accord with the district court's decree" (*ibid.*).

The court disavowed any suggestion that there is "no room in antitrust laws for ethical rules * * * to prevent harm to the lay consumer and [the] general public" (*id.*, at A–8-A–9). But it held that petitioner's proffered rationalization for the rule—"avoiding dangers to society" (*id.* at A–12)—does not justfy a broad ban on all price competition where there are no such dangers (*ibid.*), and without regard to the purchaser's sophistication, the project's complexity or price evaluation procedures (*id.* at A–9). A ban

of such scope, the court ruled, does not come within the limited doctrine that permits restrictions "narrowly defined in terms of intended social benefits notwithstanding potential effect on price" (*id.* at A–11). While that doctrine may be applicable "to ethical rules of professional associations narrowly confined to interdiction of abuses," this case does not involve that situation (*id.* at A–11-A–12).[30] The court approved the district court's conclusion that the rule as written and applied is illegal *per se* because it is "classic price-fixing" (*ibid.*).

With respect to the judgment, the court held that the case involved an "all-out interdiction of price information for the client who has not selected its engineer, and this warrants a firm remedial decree" (Pet. App. A–10). The court affirmed the district court's decree, except in one respect which it found to be overbroad.[31]

SUMMARY OF ARGUMENT

I

The courts below found that Section 11(c) of NSPE's Code of Ethics totally bans all price compe-

[30] The court noted that "[i]f the Society wishes to adopt some other ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids, it may move the district court for modification of the decree" (Pet. App. A–10).

[31] The court held the provision of the decree that orders the Society to state that it does not consider competitive bidding to be unethical, violates the First Amendment because it was "more intrusive than necessary to achieve fulfillment of the governmental interest" (Pet. App. A–12). The United States does not contest this holding.

tition in the selection of engineers by clients. This determination was made on the basis of an assessment of how the rule operated in fact and with what practical anticompetitive consequences. The rule totally blocks any information by which clients might make price comparisons and is thus fairly identified as a price-sustaining mechanism, not an ethical standard designed to protect the public. Since it is "a classic illustration of price fixing" (*Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 783), it is illegal *per se.*

Because price competition is central to the functioning of a free market, this Court has rejected claims that competitors may privately combine to eliminate it, without elaborate inquiry into possible justifications. That principle applies to the total suppression of price competition in this case, which denied consumers any opportunity to consider price in making their selection of engineers, and crippled the ability of engineers to sell their services in accordance with their own judgment.

NSPE claims that Rule 11(c) permits price competition after the selection of an engineer. Post-selection negotiation, however, is simply bargaining; price competition requires an opportunity for a pre-selection comparison that takes price into account.

A. The NSPE ban is not justified by the nature of engineering services. NSPE's contention that engineering customers will be best served if they are unable to compare prices is as invalid under the Sherman Act as it is under the

First Amendment. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* 427 U.S. 748–770.

After carefully reconsidering its judgment in the light of *Goldfarb* v. *Virginia State Bar,* the district court correctly concluded that nothing in it suggests that a total ban on price competition imposed by members of a learned profession is not to be condemned under the *per se* rule. On the contrary, *Goldfarb* held that minimum fee schedules for lawyers were "a classic illustration of price fixing" (421 U.S. at 783). While *Goldfarb* leaves open for future determination the extent to which, apart from price fixing, particular professions may collectively adopt and enforce ethical standards aimed at assuring high professional standards of service, and at preventing overreaching or breach of confidence, this case does not involve such a rule. It involves a total suppression of price competition. If an exemption from the Sherman Act's prohibition of price maintenance is to be created for the marketing of engineering services, Congress must do so. The Brooks Act, 86 Stat. 1278, 40 U.S.C. (Supp. II) 541–544, does not authorize concerted suppression of price competition by engineers.

B. Price competition for engineering services is feasible and practical. This is shown by the fact that engineers' services are sufficiently routine in many instances to be incorporated into recommended minimum fee schedules, and that price competition is

considered by NSPE to be ethical insofar as research and development contracts are concerned.

Price competition in the offering of engineering services will not endanger public safety. NSPE's practice with respect to research and development contracts, its past rules of professional conduct, which previously permitted the disclosure to a client of the cost of services prior to selection, and its allowance of price competition abroad, undermine its claim. NSPE's claim that public safety justifies the total elimination of price competition proves too much, since it would justify the elimination of price competition in large segments of the economy in which public safety is essential—*e.g.*, construction contracts, and the supplying of commodities such as food and drugs.

There are many safeguards other than the suppression of price competition to assure high quality engineering work. The profession is closely regulated by the states through the licensing process. It is also unlikely that engineers will sacrifice public safety for personal profit in view of the traditions of their profession, which make safety a primary duty of each engineer, and the importance to professional success of a good reputation. The substantial risk of legal liability, both in tort and under local construction codes, if unsafely engineered structures cause injury, provides engineers with practical incentives to concern themselves with public safety.

Moreover, there is no objective evidence that competitive bidding or price comparison by engineering clients leads to unsafely engineered structures. On the

contrary, the courts below, after carefully examining the nature and operation of Rule 11(c), correctly found it to be nothing more than "a rule that is sought to be justified in terms of avoiding dangers to society, but which has been both written and applied in practice as an absolute ban (affecting prices) that governs situations where there are no such dangers" (Pet. App. A–12).

II

The judgment bars NSPE from continuing to maintain and enforce an official policy that prevents engineers from engaging in price competition. It does not violate NSPE's First Amendment rights, since it is carefully tailored to the district court's findings that Rule 11(c) is an illegal agreement restraining price competition.

The judgment does not prohibit NSPE from persuading governmental bodies to adopt anticompetitive policies. NSPE's violation did not rest upon such evidence, but upon its "all-out interdiction" against furnishing price comparison information to consumers of engineering services (Pet. App. A–10).

ARGUMENT

I. NSPE'S BAN ON COMPETITIVE BIDDING IS ILLEGAL PER SE UNDER SECTION I OF THE SHERMAN ACT

The district court found—a finding the court of appeals upheld and which NSPE does not challenge—that Section 11(c) of NSPE's Code of Ethics totally bans all price competition among engineers seeking to be selected by clients to furnish engineering services.

In so finding, the district court did not merely examine the language of that section but, as the court of appeals noted (Pet. App. A–7 – A–8), "[i]t assessed the rule by taking into account how it had operated in fact, and with what practical anticompetitive consequences." Those consequences included an "all-out interdiction of price information for the client who has not selected its engineer" (*id.* at A–10), which "by blocking the free flow of price information, strikes at the functioning of the free market" (*id.* at A–7).

There is no question that if this complete ban on competitive bidding had been adopted and enforced by ordinary commercial entities, it would have been illegal *per se* under Section 1 of the Snerman Act. See pp. 37–43, *infra*. The question is whether the practice is excepted from *per se* condemnation because the price-fixing related to the services of members of a learned profession. NSPE argues that because the services its members supply are professional, its ban on competitive bidding is not subject to the normal rules governing price fixing, but is to be evaluated under the rule of reason that governs restraints generally viewed as not likely to be inherently pernicious.

NSPE contends that its competitive-bidding ban is necessary to protect engineering clients from deception and the public from unsafely engineered structures that allegedly would result from competitive bidding for engineering services. The court of appeals properly rejected that contention, on the

ground that the restraint is in fact "a rule that is sought to be justified in terms of avoiding dangers to society, but which has been both written and applied in practice as an absolute ban (affecting prices) that governs situations where there are no such dangers" (Pet. App. A–12). The court correctly concluded that, "having regard to its language, purpose and effect," this "absolute rule is fairly intended as a price sustaining mechanism" (*ibid.*), not an ethical standard designed to protect the public.

In short, NSPE's absolute ban on competitive bidding, like the minimum fixed fee schedules of lawyers involved in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 783, "constitute[s] a classic illustration of price-fixing" that is illegal *per se.* Both the district court and the court of appeals correctly so held. The various justifications that NSPE offers for its price-fixing activities do not warrant excepting them from *per se* illegality.

A. RULE 11(C) IS ILLEGAL *PER SE* BECAUSE IT ELIMINATES ALL MEANINGFUL PRICE COMPETITION AMONG PROFESSIONAL ENGINEERS IN THE MARKETING OF THEIR SERVICES

Agreements among competitors to fix or stabilize prices, to eliminate or limit price competition, or otherwise to tamper with the pricing process, are illegal *per se* under Section 1 of the Sherman Act "because of their pernicious effect on competition and lack of redeeming virtue" (*Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5). This Court uniformly has rejected claims that actions by competitors

eliminating or limiting price competiton were reasonable [32]—and has done so "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use" (*ibid.*). Price competition is "the central nervous system of the economy" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59), and "interference with the setting of price by free market forces is unlawful *per se*" (*United States* v. *Container Corp.*, 393 U.S. 333, 337).

Price is so "critical" and "sensitive" to our economy (393 U.S. at 338) that, as the court of appeals stated (Pet. App. A–7), "a rule that operates to prevent price competition stands at least presumptively condemned in a way that does not apply to other kinds of trade practice rules." Indeed, "limitation[s] or reduction[s] of price competition" are within the ban of *per se* illegality even though "some price competition" continues (*Container, supra,* 393 U.S. at 337, 338). Price-fixing agreements not only create a price system that partially or totally denies consumers the opportunity to consider price in making their economic choices, but also "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment" (*Kiefer-Stew-*

[32] See, *e.g.*, *United States* v. *Trenton Potteries Co.*, 273 U.S. 392; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223; *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485. See, also, *United States* v. *Container Corp.*, 393 U.S. 333, 337; *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, No. 76–15, decided June 23, 1977, slip. op. 21, n. 28.

art Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213).[33]

These considerations apply to the complete ban against price competition in Rule 11(c). The district court found, in sum, that NSPE and its members have combined to impose on the public, before an engineer is selected, a flat prohibition on engineers' disclosure to potential clients of any price information other than uniform recommended fee schedules. The ban applies no matter how simple and repetitive the work, how expert the purchaser, or how thoroughly the engineer has been able to study the project before quoting a price. (See Statement, *supra,* pp. 14–17.) These findings support the district court's ultimate findings that the restraint "prohibits defendant's members from engaging in any form of price competition when offering their services," restricts "the free play of market forces from determining price," and generally "has the intent and effect of eliminating price considerations as a competitive factor in the supplying of engineering services" (J.A. 9939–9941). The trial court's findings, which the court of

[33] Contrary to NSPE's contention (Br. 52–53), *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, No. 76–15, decided June 23, 1977, did not undermine the rule that price-fixing, or the total suppression of price competition, is illegal *per se*. That case involved vertical territorial restrictions imposed by a manufacturer on its franchisees. In holding that such restrictions should be judged under the rule of reason, rather than the *per se* doctrine, the Court emphasized that "we are concerned * * * only with non-price vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy" (slip. op. 15, n. 18).

appeals affirmed, establish *prima facie* the *per se* illegality of NSPE's ban on competitive bidding. *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508.

The purpose of the ban is to maintain price. This is shown by its universal, unqualified application, and by the history of its adoption, promotion, amendment and enforcement. As the district court found and as the record shows, the ban is substantially motivated by pocketbook interests (see Statement, *supra,* p. 22-24), and "has as its purpose and effect the excision of price considerations from the competitive arena of engineering services" (J.A. 9941). As the court of appeals correctly observed: "the absolute rule is * * * identified as a price-sustaining mechanism * * * that at its core 'tampers with the price structure'" (Pet. App. A–12; footnote omitted).

On its face the prohibition forbids engineers from disclosing any "measure of compensation whereby the prospective client may compare engineering services prior to the time that one engineer, or one engineering organization has been selected for negotiations" (Statement, *supra,* p. 4). NSPE contends (Br. 13, 14) that the provision restricts price competition only until the client makes an "initial, tentative" selection of an engineer. But that is a critical point in the selection of an engineer. For various practical reasons—usually relating to the time and expense—the initial selection is generally the final selection (J.A. 802). Post selection negotiation is not a meaningful substitute for a pre-selection comparison that takes

price into account.[34] It is bargaining, not price competition.

The NSPE ban on competitive bidding is designed and applied to keep potential clients in ignorance of all price comparison data, which often is the critical factor for determining the choice of a supplier of services or goods. Competition for the client's business is restricted "to factors based on reputation, ability, and a fixed range of uniform prices" (J.A. 9941). "Since engineering services are indispensable to almost any construction project and since alternative sources * * * are nonexistent" (J.A. 9988), "[t]he prospective client is thus forced to make his selection without all relevant market information" (J.A. 9941).

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[34] Petitioner's statement that competitive bidding requires the engineer to submit his price proposal "before, not after he has consulted with the client" (Pet. Br. 19, 20) is incorrect. Price cannot be estimated apart from an accompanying initial service proposal. Initial study and consultation are usually necessary for non-routine tasks. NSPE's Rule 50 for many years provided that the engineer ~~to submit his price proposal "before, not after, he has con-~~ complish (J.A. 7182). Section 11(c), however, bars the engineer from submitting price information to a client before he is selected, no matter how technically sophisticated the client and no matter how much opportunity the engineer has been given to consult with the client and study the project. Thus, when the Department of Defense conducted its limited "two envelope" experiment in competitive bidding, NSPE endorsed the submission of the envelope which contained the engineer's technical proposal for the job. It objected only to submission of the second envelope—the envelope for the price proposal (FP. 46, 50, J.A. 9957, 9959). NSPE recommended that its members merely enclose a fee schedule in the second envelope (FP. 50, J.A. 9959). Similarly, NSPE's Rule 50 for many years stated that the engineer "should set forth in detail the work he proposes to accomplish" and could quote a fee before being retained (J.A. 7182).

should set forth in detail the work he proposes to ac-

For, as the district court noted, "[w]ithout the ability to utilize and compare prices in selecting engineering services, the consumer is prevented from making an informed, intelligent choice" (J.A. 9988).

Although a client may, prior to entering into a contract, terminate its relation with the selected firm, it must completely sever those relations before approaching another firm. See Professional Policy 10–F (J.A. 5767, 9930). Thus, the client—event a client as knowledgeable and important as the Department of Defense (FP. 46–51, J.A. 9957–9959)—is never able to choose among different firms on the basis of the total price-service package of those firms.

Section 11(c) also cripples the ability of engineers themselves to compete on the basis of price. For the ban increases "the difficulty of discovering the lowest-cost seller of acceptable ability. As a result, to this extent [engineers] are isolated from competition, and the incentive to price competitively is reduced." *Bates* v. *State Bar of Arizona,* No. 76–316, decided June 27, 1977, slip op. 25[35]; *Kiefer-Stewart Co.*

[35] Although *Bates* dealt with attorneys, its analysis of the competitive impact of restraints on the marketing of professional services applies with equal force to the engineering profession. That analysis, not based on the antitrust laws, was for the purpose of demonstrating that commercial information about the price and availability of professional services was of sufficient social value to warrant constitutional protection, Cf. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* 425 U.S. 748.

NSPE contends (Pet. Br. 57, 72–75), however that the *per se* doctrine is inapplicable to its total ban on price competition for reasons analogous to another aspect of *Bates* v. *State Bar of Arizona, supra*: The Court's holding that the validity, under the First Amendment, of a state-imposed ban on advertising by attorneys should be tested "as applied" rather than under the "overbreadth" doctrine (slip op. 28–29). This aspect of the decision turns on the Court's conclusion that state regulation of advertising by lawyers is unlikely to chill that form of commercial speech (*ibid*). It thus represented a balancing of considerations of federalism: the states' regulatory power and the dangers of suppressing protected speech. The rule that price-fixing, and the wholesale suppression of price competition, is illegal *per se* rests upon wholly different considerations of economic policy Congress has made applicable to interstate commerce. See *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, No. 76–15, decided June 23, 1977, slip op. 15, n. 18.

[36] See note 35, *supra.*

v. *Joseph E. Seagram & Sons, Inc., supra,* 340 U.S, at 213. Moreover, by suppressing price-competition the ban puts a premium on an engineer's experience and reputation, and thereby "serves to perpetuate the market position of established [engineers]." *Bates, supra,* slip op. 26.[36]

B. NSPE'S BAN ON PRICE COMPETITION IS NOT JUSTIFIED BY THE NATURE OF ENGINEERING SERVICES OR THE CLAIM THAT PRICE COMPETITION WILL RESULT IN UNSAFELY ENGINEERED STRUCTURES

NSPE makes a number of arguments allegedly showing that its prohibition of price-competition in the marketing of engineering services is justified. The contention seems to be double barreled. First, the justifications are offered to show that NSPE's ban on price competition should be tested under the rule of reason and not condemned as *per se* illegal. Second, the argument is that under the rule of reason, the restraints are reasonable and legal.

NSPE urges that the character of engineering services makes price competition in their marketing impractical, and that such competition is likely to lead to inferior services, with the consequent danger to public safety that improperly engineered structures will be built. We discuss these arguments below, and show that they do not withstand analysis and are not supported in the record. First, however, we place these contentions in perspective.

NSPE's contention rests on the assumption that it is desirable that engineering clients not be able to consider price in selecting an engineer, and that consumers of engineering services will be best served if "they are not permitted to know who is charging what" (*Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, 770). This contention has no more validity under the Sherman Act, which is particularly concerned with the protection of price competition, than it had under the First Amendment. *Virginia State Board of Pharmacy, supra.*

If an exemption from the Sherman Act's prohibition of price fixing is to be created for the marketing of engineering services, it is for Congress, not for the courts, to do so. *United States* v. *Trenton Potteries, supra,* 273 U.S. at 397–398; *United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. at 225–227.

Indeed, Congress has exempted from the Sherman Act restrictive activities in certain industries. See,

e.g., the Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291–292 (agricultural cooperatives); the McCarran-Ferguson Act, 59 Stat. 34, 15 U.S.C. 1011–1013 (insurance); the Reed-Bulwinkle Act, 62 Stat. 472, 49 U.S.C. 5b (rail and motor carrier rate-fixing bureaus); Newspaper Preservation Act, 84 Stat. 466, 15 U.S.C. 1801 *et seq.* (newspaper joint operating agreements).

NSPE cites the following statement by this Court in *Goldfarb* v. *Virginia State Bar, supra,* 421 U.S. at 788, n. 17, made in connection with its ruling that there is no exemption from the Sherman Act for the learned professions:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

There is nothing in either this statement or in the remainder of the *Goldfarb* opinion indicating, or even

suggesting, that a total ban on price competition imposed by members of a learned profession is not to be condemned under the *per se* rule.[37] Indeed, the holding in *Goldfarb* itself refutes that claim. *Goldfarb* involved minimum fee schedules for lawyers, which the Court condemned as a "classic illustration of price fixing" (421 U.S. at 783).

The defendants in *Goldfarb* made a similar argument to that NSPE makes here. They urged that the legality of their price fixing should be determined under the rule of reason because the case involved a novel application of Section 1 of the Sherman Act to professional services, and that under that rule their restraints were reasonable because permitting price competition would result in lawyers cutting costs and rendering cheap and shoddy service[38] (cf. Pet. Br. 49–50, 57). This Court did not accept this argument. Recognizing that legal services have a "business aspect" (421 U.S. at 788), the Court found it unnecessary to pursue its antitrust inquiry beyond the deter-

[37] NSPE errs in contending (Br. 91–94) that the courts below treated as "meaningless" this Court's vacation of the district court's first judgment, and remand for reconsideration in the light of *Goldfarb*. *National Society of Professional Engineers* v. *United States* (422 U.S. 1031). As shown by the district court's opinion on remand (404 F. Supp. 457; J.A. 9985), and the court of appeals' ruling on this contention (Pet. App. A–8), the district court "engage[d] in a detailed study" on this issue, which was "a sound discernment of *Goldfarb* and its radiations" (*ibid.*) (see Statement, *supra*, pp. 27–30).

[38] *Goldfarb* v. *Virginia State Bar*, *supra*, Brief for Respondent Fairfax County Bar Association, pp. 34, 53–55; Brief on Behalf of Respondent Virginia State Bar, p. 16.

mination that the defendants' activities constituted price fixing.[39]

NSPE seeks to support its position by reference to the Brooks Act, 86 Stat. 1278, 40 U.S.C. (Supp. II) 541–544, in which Congress in 1972 provided that the government should procure certain engineering services by direct negotiation rather than through competitive bidding. But the fact that the legislature has decided that the government should not acquire engineering services through competitive bidding is a far cry from sanctioning concerted action by a private group which deprives customers (including the government) of the freedom to make that choice for

[39] Footnote 17 of *Goldfarb* leaves open for future determination the extent to which, apart from price-fixing, particular professions may collectively adopt and enforce ethical standards aimed at assuring high professional standards of public service, and at preventing overreaching or breach of confidence. Such rules may be valid under the Sherman Act, if no more restrictive than necessary, even though collective restraints enforced by non-professional groups may be unlawful. Compare *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457. But since, as the court of appeals correctly held, this case involved a total suppression of price competition, not a rule "narrowly confined to [the] interdiction of abuses" (Pet. App. A–12), it was unnecessary to consider this question. NSPE elaborately argues that even restraints affecting price may in certain contexts be judged under the rule of reason (Pet. Br. 41–51). Examination of the cases on which it relies (*e.g.*, *Chicago Board of Trade* v. *United States*, 245 U.S. 231; *Maple Flooring Manufacturers Assn.* v. *United States*, 168 U.S. 563), however, shows that the alleged restrictions in those cases only peripherally affected price, and that they in fact enhanced competition by assuring equal access to information necessary to rational decision making. NSPE's Rule 11(c), on its face and as applied, interferes with rational economic choice by preventing any possibility of price comparsion.

themselves. There is an enormous difference between customer choice and sellers' imposition.

Congress recognized this distinction in enacting the Brooks Act. The legislative history states that the Act would not "limit the operations of the Department of Justice in the application of our antitrust laws" (H.R. Rep. No. 92–1188, 92d Cong., 2d Sess. 6 (1972)). The Brooks Act does not indicate that Congress intended to exempt price fixing by professional engineers in the marketing of their services from *per se* illegality.

We now turn to the particular justifications NSPE offers for its ban on competitive bidding.

1. Price Competition for Engineering Services is Feasible and Practical

Engineering services are not so unique or incapable of advance evaluation as to make price quotations prior to selection of the engineer to do the work inherently misleading. To the contrary, prices quoted in response to a request for a bid on engineering services necessarily must be based on a focused assessment of the specific task. Moreover, purchasers of engineering services, particularly governmental and industrial entities, are likely to be highly sophisticated in the technical aspects of their engineering requirements, and well able to determine the reliability of price estimates in the light of the engineer's qualifications. In addition, as the court of appeals noted, "the professional who responds to a request for a bid has a better grasp of the specific task before him and a better opportunity to take into account the sophistication of the potential purchaser" (Pet. App. A–9 n. 4).

NSPE's own practice shows that price competition in the rendering of engineering services is both feasible and practical. Engineering services cover a wide spectrum. Some services are so repetitive that the engineer actually uses "the same design as had been used in a previous project" (FP. 41, J.A. 9955). Others are sufficiently standardized that they are incorporated into recommended fee schedules of state engineering societies, to which NSPE's Rule 11(c) expressly refers and which are enforced as "ethical" minimum fees (FP. 39–41, J.A. 9955). Cf. *Bates* v. *Arizona, supra,* slip op. 21. As NSPE officials have recognized with respect to conventional engineering services, "[n]ormally there have been significant numbers of other similar projects so that the required scope of effort, approach and necessary steps are generally known" (J.A. 5739; see Statement, *supra,* p. 15, 16). The least standardized service, for which costs are most difficult to predict (see Statement, *supra,* pp. 12–14), involves pioneering research and development.

With respect to both highly standardized and highly unusual services, NSPE permits disclosure of price information to potential clients prior to selection of an engineer. In the former situation, it is done by "[t]he disclosure of recommended fee schedules prepared by various engineering societies" (Rule 11(b), *supra,* p. 4). In the latter situation, at least since 1972, NSPE has permitted price competition for research and development contracts (see Statement, *supra,* p. 12–14.). Of course, the recommended fee

schedules, as the district court found, confine the client to a "fixed range of uniform prices" and thus restrict meaningful price comparison (J.A. 9941). When, in 1972, NSPE opened R & D contracts to price competition, it did so because only through competitive bidding could engineering firms obtain this lucrative business in the face of competition from other types of enterprise willing to bid (see Statement, *supra,* p. 12–14).

The fee schedules and the "ethical" classification of competition for research and development contracts show that engineering services are not so universally unique as to render price comparison unworkable.

2. Price Competition in the Offering of Engineering Services Will Not Endanger Public Safety

NSPE claims that price competition would force engineers to make unreasonably low bids, to cut corners, and thus to endanger the safety of the public. The work of an engineer, it asserts, "affects a population—and usually a large population—rather than an individual" and therefore "the consequences of error * * * are generally greater than in medicine or law" (Pet. Br. 7).

Curiously, however, NSPE now argues that there is little risk of this kind associated with research and development contracts (Pet. Br. 16), although prior to 1972, it applied its ban against disclosing price information to such work. Similarly, safety apparently was not a problem under former Rule 50 of NSPE's Rules of Professional Conduct, which for many years provided that an engineer could ethically inform a client of the cost of services he proposed to provide,

although the NSPE discouraged the giving of such information (see J.A. 7182). Moreover, despite the claimed concern for safety, for two years between 1966 and 1968, NSPE's "When-in-Rome" clause expressly allowed fee bidding in foreign countries (J.A. 6487).[40] Nor does NSPE seem concerned for safety in recommending state fee schedules.[41]

In any event, this justification is unsound for a number of other reasons. The claim proves too much,

[40] The "When-in-Rome" clause was revoked because many members did not need it to secure overseas business, and because it was an obvious embarrassment domestically. As the PEPP Section Committee stated: "How can we explain satisfactorily to GAO [General Accounting Office] why OK to bid on overseas work and not on domestic work?" (J.A. 9890).

[41] The fee schedules to which NSPE has required that its members adhere, generally are based on a percentage of the construction cost of a project (*e.g.*, J.A. 7952–7955, 8114, 8235–8239, 8361–8365).

NSPE's own executive director testified that with this method "* * * you get the same price, whether you do good or poor engineering. Therefore, the less engineering you can do, perhaps the more profit you make, providing, of course, you make a satisfactory, adequate building" (J.A. 1793–1794).

His testimony also undermines NSPE's claim that fee competition will "increase * * * construction, maintenance, operating and life-cycle costs" (Pet. Br. 31). When an engineer computes his fee as a percentage of construction cost, "[t]here is also almost no incentive to work on the life cycle [costs] business because it [the fee] is entirely in terms of the construction at the end of the project itself" (J.A. 1794).

Although NSPE now asserts that it "recommends against use of the percentage of construction cost method" (Pet. Br. 14), its Guide For Professional Engineers' Services, first issued in 1969 and now in use (J.A. 6522), fully describes the circumstances where "[t]his method is applicable." It cautions that "fee schedules or curves applicable to the region in which project is to be constructed should be used when this method of compensation is adopted" (J.A. 5488).

since it would justify the elimination of price competition in large segments of our economy. The fact that engineers deal intimately with matters of public safety hardly distinguishes them from numerous other businesses and professions whose work is also essential to public safety. Most work by construction contractors, for example, involves public safety. Under NSPE's public safety theory, general building contractors, as well as plumbing, electrical, masonry, welding, and other construction sub-contractors, could all agree to eliminate price competition for their services. The theory would also seem to cover the suppliers of commodities that affect public safety and health, such as the manufacturers and dispensers of drugs and cosmetics.

Further, the argument assumes that engineers will sacrifice public safety for personal profit. The professional traditions of engineering, which make safety a primary responsibility are themselves a principal safeguard against such conduct.[42] Under a system of price competition, engineers, no less than lawyers, can be expected to uphold the integrity and honor of their profession, and to conduct themselves with candor and

[42] NSPE has long had several Code provisions aimed at preventing unsafe engineering and deceptive fee proposals. Its Code provides (Pet. App. A–50—A–59):

"Section 1—The Engineer * * * a. * * * will be realistic and honest in all estimates, reports, statements, and testimony.

* * * * *

"c. He will advise his client or employer when he believes a project will not be successful.

* * * * *

"Section 2—The Engineer will have proper regard for the

honesty in estimating the price of their services for particular tasks in seeking to be selected. Cf. *Bates*, *supra*, slip op. 27; *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 748.[43]

safety, health, and welfare of the public in the performance of his professional duties * * *. He will notify the proper authority of any observed conditions which endanger public safety and health.

"a. He will regard his duty to the public welfare as paramount.

"b. He shall * * * work for the advancement of the safety, health and well-being of his community.

"c. He will not complete, sign, or seal plans and/or specifications that are not of a design safe to the public health and welfare and in conformity with accepted engineering standards. If the client or employer insists on such unprofessional conduct, he shall notify the proper authorities and withdraw from further service on the project.

* * * * *

"Section 6—The Engineer will undertake engineering assignments for which he will be responsible only when qualified by training or experience; and he will engage, or advise engaging, experts and specialists whenever the client's or employer's interests are best served by such service.

* * * * *

"Section 13— * * *

"a. He will conform with registration laws in his practice of engineering."

[43] Competitive bidding by lawyers is no longer unethical under the ABA Canons of Ethics. See American Bar Association, *Committee on Professional Ethics*, Formal Opinion 329 (August, 1972), overruling a prior opinion (No. 292, October 15, 1957) that had characterized any response to an invitation to bid on a legal services contract as unethical solicitation. Engineers can ethically publicize, through brochures and other factual representations, their "experience, facilities, personnel and capacity to render service" (Pet. App. A–52; examples of these promotional brochures are reproduced at J.A. 8849–8949, 9079–9889). Cf. *Bates*, *supra*, slip op. 14, 17, (majority opinion), 8 (Powell, J., dissenting).

High professional standards in engineering, moreover, are enforced by state regulation (FP. 6, J.A. 9945, 9966), and engineers who endanger public safety risk loss of their licenses. Cf. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra,* 425 U.S. at 768."

Structures must also meet the safety requirements of local building codes.[45] Engineers and contractors who are responsible for unsafe structures risk sub-

[44] Every state has laws which provide for the licensing and registration of engineers, and all engineers who offer their services to the public must be registered (FP. 6, J.A. 9945, FD. 3, J.A. 9964). Although the provisions of these laws vary from state to state, they usually require an individual to be a graduate engineer, to have at least four years of experience, and to pass a written examination in order to be certified (FP. 6, J.A. 9945). State registration laws also often require that licensed engineers practice only in those specialty areas where they are qualified and competent, and practice in other areas may subject an engineer to sanctions that can include loss of license (FP. 7, J.A. 9945–9946). Licensing and registration boards throughout the United States have the authority to discipline registered professional engineers, and the laws of most states provide that professional misconduct is a basis for suspending or revoking a professional engineer's license (FD. 3, 39, J.A. 9964, 9969).

[45] Various municipal construction codes and other codes relating specifically to plumbing, electricity, fire prevention, and similar topics, govern the performance of architects, engineers, electricians, plumbers, and others involved in designing and constructing buildings of various types. See, *e.g.*, Administrative Code of the City of New York, ch. 26, Title C (1968); District of Columbia Rules and Regulations, Title 5A–1 (1972, as amended to 1977). States, too, have begun to adopt their own construction codes, not only to permit efficient and economical construction techniques, but also to promote uniform standards for protection of the public health and safety. See, *e.g.*, New Jersey Stat. Ann. § 52:27D–119, *et seq.* (1976); also, Virginia Code Ann. § 36–97 *et seq.* (1977 Supp.).

stantial legal liability both in tort and under local construction codes if the structure collapses or causes injury. That risk itself provides a substantial incentive for both client and engineer to assure themselves that safety is engineered into any project.

Since the award of engineering contracts significantly involves the client's confidence and trust (FD. 49, J.A. 9970), an engineer who does shoddy, unsafe work—like an engineer who deceives the client about price—also risks loss of his reputation, even if he does not lose his license.

Although NSPE conjures up the specter of collapsing bridges and falling buildings where price competition is involved (Pet. Br. 28–29), there is no evidence in this record that competitive bidding or price comparison was a factor in the accidents to which it refers (J.A. 1028–1053; see also J.A. 1862–1864, 2010–2011, 2014–2015, 2085–2087, 1317–1318, 516–519, 838–839, 261–266).

NSPE is simply arguing, on the basis of self-serving speculation,[46] that price competition is so universally likely to endanger public safety, that it may be eliminated by the private collective decision of those most likely to profit thereby. But the courts below, after carefully examining the nature and operation of

[46] NSPE has been constantly mindful of the economic interests of engineers in prohibiting price competition. It has advised its members that adherence to the ban on competitive bidding will protect higher engineering fees (FP. 35, J.A. 9953) and has cautioned that in the long run, an engineer "reduces his own fee capability by bidding" (J.A. 6300).

Rule 11(*c*), found it to be nothing more than "a rule that is sought to be justified in terms of avoiding dangers to society, but which has been both written and applied in practice as an absolute ban (affecting prices) that governs situations where there are no such dangers" (Pet. App. A–12). The record fully supports that conclusion.[47]

II. THE JUDGMENT DOES NOT VIOLATE NSPE'S FIRST AMENDMENT RIGHTS

NSPE claims that portions of the judgment summarized above (Statement, *supra*, p. 26)—which bar it from continuing to maintain and enforce an official policy that prevents engineers from engaging in price competition—violate its First Amendment rights (Pet. Br. 77–91). It did not make this argument to the district court initially [48] or during the proceedings on remand.

[47] As the court of appeals pointed out, however, "[i]f the Society wishes to adopt some other ethical guidelines [than Section 11(c)] more closely confined to the legitimate objective of preventing deceptively low bids, it may move the district court for modification of the decree" (Pet. App. A–10). See also note 39 *supra*, p. 47, note 50, *infra*, pp. 57–58.

[48] We dispute NSPE's claim (Br. 77) that it was improperly denied a hearing. When in late 1974 the district court first ruled for the government, it invited the United States, as prevailing party, to submit a proposed judgment. The government did so. At the urging of NSPE's counsel, attorneys for each side met with District Judge Smith at his home on New Year's Eve to discuss the judgment. No transcript was made. Government counsel was agreeable to holding a hearing on any disputed terms of the judgment, but NSPE's counsel opposed this because such a hearing would have delayed the entry of judgment until after the expiration of the provision of the Expediting Act, which allowed direct appeals to this Court. NSPE counsel insisted that judgment be entered immediately, and the court complied with his request.

After remand from this Court, the district court held a hearing on November 7, 1975. At this hearing, counsel for NSPE stated in passing that he wanted a "hearing on the form and content of the decree" (Tr. 51). Neither the government nor the district court had any objection to such a hearing, but petitioner never followed up the matter, either in the ensuing three weeks leading to the entry of judgment, or thereafter.

[49] Although NSPE claims that it has not enforced Section 11(c) (Pet. Br. 85), the district court found otherwise (FP. 56–69, J.A. 9964; J.A. 9940). As the court of appeals concluded (Pet. App. A–5, A–9—A–10), this finding is not clearly erroneous. See pp. 17–22, *supra*.

[50] NSPE misreads the court of appeals decision insofar as it contends (Br. 94–97) that it is being subjected to a broad injunc-

The decree—as modified by the court of appeals (Statement, *supra*, p. 31)—provides a remedy tailored to the district court's findings that NSPE's Rule 11(c) is an illegal agreement restraining price competition (J.A. 9943, 9972, 9974, 9990), and that NSPE secured adherence to its terms by extensive publicity and by enforcement activities. Those activities were neither political nor commercial speech. NSPE was not simply expressing its views concerning the desirability of price competition in an attempt to persuade its members independently to decide to refrain from price competition. Rather NSPE promulgated and enforced [49] an "ethical" rule which coerced its members to avoid price competition.

Its program was thus, in the court of appeals' words, "one of all-out interdiction of price information" (Pet. App. A–10).[50] As this Court has held:

> * * * [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. * * * Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society. [*Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502.]

Although petitioner broadly complains of interference with its right to speak, the judgment does no more than is necessary to prevent a recurrence of petitioner's numerous and widespread activities in publicizing and enforcing its total ban on price competition because it exercised its right to contest the government's complaint. The court of appeals simply held that NSPE's belated offer, at argument, to "work out a more refined decree" (Pet. App. A–10) did not invalidate the relief ordered by the district court. First, as the court noted, no such initiative had been made in the district court (*ibid.*). Second, NSPE's unyielding position throughout this litigation is that it may suppress price competition under "the principle embodied in Section 11(c)," however it is formulated (Pet. Br. 75). Since, on the record as it stood, NSPE implemented this "principle" by "an all-out interdiction of price information" the court of appeals held that "this warrants a firm remedial decree" (Pet. App. A–10).

NSPE remains free, of course, to devise narrower ethical rules that comply with the antitrust laws.

petition by engineers.[51] *United States* v. *Gypsum Co.*, 340 U.S. 76, 89. Such relief is consistent with decisions of this Court holding that a judgment in an antitrust case may restrain such activities in order to prevent repetition of Sherman Act violations. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 514; *United States* v. *Otter Tail Power Co.*, 360 F. Supp. 451 (D. Minn.), affirmed *per curiam*, 417 U.S. 901.[52]

Petitioner's narrower argument that the judgment "runs directly contrary to the *Noerr-Pennington* doctrine" (Pet Br. 83), is also without merit, *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, established that the antitrust laws do not prohibit efforts to persuade governmental bodies to adopt anticompetitive policies. NSPE's violation of the antitrust laws, as

[51] NSPE inaccurately describes (Pet. Br. 79–80) the breadth of the judgment. The decree restrains the Society from official communications designed to produce or resulting in the illegal concerted business practices formerly done. Thus, ¶ VII of the judgment bars the dissemination only of a Code, rule, or guideline which prohibits or discourages the submission of price quotations (Pet. App. A–17). Similarly, although NSPE claims that all its members, as individuals, are swept up by the decree (Pet. Br. 77–78), the relevant definitional provision, ¶ III, makes it clear that the judgment applies only to persons other than NSPE when they are "in active concert or participation with the defendant * * *" (Pet. App. A–15—A–16).

[52] See also: *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 616–618; *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190, 226; *Zacchini* v. *Scripps-Howard Broadcasting Co.*, No. 76–577, decided June 28, 1977.

found by the district court, did not rest upon such efforts.[53] Nothing in the judgment prevents NSPE and its members from attempting to influence governmental action,[54] or from communicating their views to state or federal officials.[55]

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[53] NSPE argues at length (Pet. Br. 83–85 n. 253) that its successful boycott of the Department of Defense "two envelope" experiment was "privileged conduct under the *Noerr-Pennington* doctrine" (*id.* at 85 n. 253). The argument misses the mark. The district court did not hold that NSPE's lobbying efforts were not constitutionally protected or were the basis of antitrust liability. What it did find, however, was that NSPE and its allies had gone beyond activity protected under the *Noerr-Pennington* doctrine and had engaged in economic coercion to frustrate the government effort to obtain price competition (FP. 46–51. J.A. 9957–9959). These findings, as the court of appeals held (Pet. App. A–10), are correct.

[54] Indeed. the only mention in the judgment of government officials is in Paragraph VIII's requirement that NSPE send copies of the judgment to each State Board of Engineering Registration in the United States (Pet. App. A–17).

[55] NSPE's claim that Paragraph IX unconstitutionally infringes its associational rights (Pet. Br. 88–90) is groundless. Paragraph IX simply bars NSPE from granting affiliation to a state or local society that "prohibit[s], discourage[s] or limit[s] [its] members from submitting price quotations for engineering services at such times and in such amounts as they may choose [or which otherwise] participate[s] in or * * * [adopts] any plan, program or course of action which has the purpose or effect of suppressing or eliminating competition among [its] members based upon engineering fees" (Pet. App. A–18 – A–19). Since the district court found that NSPE has worked in conjunction with its state and local affiliates both in propagating fee schedules and in enforcing the ban on competitive bidding. this provision is reasonable as a method of preventing recurrence of those pactices.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
JOHN H. SHENEFIELD,
Assistant Attorney General.
HOWARD E. SHAPIRO,
Assistant to the Solicitor General.
ROBERT B. NICHOLSON,
SUSAN J. ATKINSON,
Attorneys.

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